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The Scope of Testimonial Immunity under the Fifth Amendment: Kastigar v. United States

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THE SCOPE OF TESTIMONIAL IMMUNITY UNDER THE FIFTH AMENDMENT: *KASTIGAR v. UNITED STATES*[1]

The Fifth Amendment to the United States Constitution provides that "[n]o person shall be . . . compelled in any criminal case to be a witness against himself."[2] This privilege against self-incrimination can be asserted in any proceeding—criminal, civil, administrative or investigatory.[3] It provides the witness with a right to refuse to answer any questions "that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used."[4]

It has been said that the privilege against self-incrimination "registers an important advance in the development of our liberty—'one of the great landmarks in man's struggle to make himself civilized.' "[5] The privilege, however, has often been criticized because of its interference with the government's power to compel witnesses to testify in court, before grand juries and before governmental agencies.[6] To overcome this interference, legislation has been enacted permitting the government to compel a witness to answer questions concerning criminal activities, in exchange for which the witness is given protection (immunity) from use of the testimony in criminal proceedings against him.[7] The extent of immunity that must be granted such a witness to avoid violation of his Fifth Amendment privilege was the question presented to the United States Supreme Court in *Kastigar v. United States.*[8]

A federal grand jury in the Central District of California subpoenaed petitioners, Charles Joseph Kastigar and Michael Gorean

1. 406 U.S. 441 (1972).

2. U.S. CONST. amend. V.

3. 406 U.S. at 444, *citing* Murphy v. Waterfront Comm'n, 378 U.S. 52, 94 (1964) (White, J., concurring); McCarthy v. Arndstein, 266 U.S. 34, 40 (1924); United States v. Saline Bank, 26 U.S. (1 Pet.) 100, 104 (1828); *cf.* Gardner v. Broderick, 392 U.S. 273 (1968).

4. 406 U.S. at 445, *citing* Hoffman v. United States, 341 U.S. 479, 486 (1951); Blau v. United States, 340 U.S. 159 (1950).

5. Ullmann v. United States, 350 U.S. 422, 426 (1956), *quoting* E. GRISWOLD, THE FIFTH AMENDMENT TODAY 7 (1955).

6. L. MAYERS, SHALL WE AMEND THE FIFTH AMENDMENT? (1959); Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671 (1968).

7. See text accompanying notes 19-21 *infra.*

8. 406 U.S. 441, 442 (1972).

Stewart, to appear and testify on February 4, 1971. Believing that they were apt to claim their Fifth Amendment privilege against self-incrimination,[9] the Government requested an order from the district court compelling them to produce evidence and to answer questions before the grand jury subject to a grant of immunity conferred pursuant to sections 6002 and 6003 of Title 18 of the United States Code.[10] Contesting the issuance of the order, petitioners claimed the limited immunity granted by the statute was "not coextensive with the scope of the privilege against self-incrimination, and therefore was not sufficient to supplant the privilege and compel their testimony."[11] This argument was rejected by the district court and the petitioners were ordered to appear before the grand jury and to answer its questions.[12]

Petitioners appeared but refused to answer any questions.[13] They were again brought before the district court, where they persisted in their refusal to answer the grand jury's questions.[14] Finding both in

9. *Id.* at 442.

10. These sections are contained in Title II of the Organized Crime Control Act of 1970, 84 Stat. 922 (codified in scattered sections of 18 U.S.C.). 18 U.S.C. § 6002 (1970) provides:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—
> (1) a court or grand jury of the United States,
> (2) an agency of the United States, or
> (3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,
> and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving false statement, or otherwise failing to comply with the order.

18 U.S.C. § 6003 provides:

> (a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.
> (b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—
> (1) the testimony or other information from such individual may be necessary to the public interest; and
> (2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

11. 406 U.S. at 442.

12. *Id.*

13. *Id.*

14. *Id.*

contempt, the district court committed them to the Attorney General's custody until they answered the questions or the grand jury term expired.[15] The contempt order was affirmed by the Court of Appeals for the Ninth Circuit[16] and the Supreme Court of the United States granted certiorari.[17] The Court, in an opinion by Justice Powell for five members of the Court, affirmed the lower court decisions. Justices Douglas and Marshall dissented in separate opinions.[18]

Immunity statutes may be separated into three categories. *Use* immunity statutes prohibit only the subsequent use of the compelled testimony in criminal prosecutions against the witness.[19] *Use and derivative use* immunity statutes prohibit the subsequent use of compelled testimony and any evidence derived from such testimony in criminal prosecutions against the witness.[20] *Transactional* immunity statutes prohibit the prosecution of the witness in regard to any matter relating to which he testified.[21]

The *Kastigar* majority held that the United States need only grant

15. *Id.* The contempt order was issued pursuant to 28 U.S.C. § 1826 (1970), which provides in part:

> (a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of—
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> (1) the court proceeding, or
>
> (2) the term of the grand jury including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

16. Stewart v. United States, 440 F.2d 954 (9th Cir. 1971).

17. 402 U.S. 971 (1971).

18. Justice Brennan and Justice Rehnquist took no part in the consideration of the case. 406 U.S. at 441.

19. A use immunity statute is exemplified by the Act of Jan. 24, 1862, ch. 11, 12 Stat. 333, which provides:

> [T]he testimony of a witness examined and testifying before either House of Congress . . . shall not be used as evidence in any criminal proceeding against such witness in any court of justice: *Provided, however,* That no official paper or record, produced by such witness on such examination, shall be held or taken to be included within the privilege of said evidence so to protect such witness from any criminal proceeding as aforesaid . . . .

20. This is the form of immunity statute involved in *Kastigar. See* note 10 *supra.*

21. An example of a transactional immunity statute is the Act of Feb. 11, 1893, ch. 83, 27 Stat. 443, which provides:

> [N]o person shall be excused from attending and testifying . . . for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpoena . . . . *Id.* at 443-44.

immunity from the use of the compelled testimony and evidence derived therefrom in a subsequent criminal prosecution—use and derivative use immunity.[22] Complete immunity from prosecution for the crimes to which the testimony related was held not to be constitutionally required.[23] Thus, a witness who refuses to testify because he believes his answers might tend to incriminate him can be compelled to testify and then be prosecuted by the same government for crimes relating to his testimony.[24] Justices Douglas and Marshall refused to condone such a result. Justice Douglas reiterated his view that transactional immunity, at the very least, is mandated by the requirements of the Fifth Amendment.[25] Justice Marshall advanced the view that any grant of immunity must put the witness "in precisely the same position, *vis-à-vis* the government that has compelled his testimony, as he would have been in had he remained silent in reliance on the [Fifth Amendment] privilege."[26] The only way this may be accomplished as a practical matter, in Justice Marshall's view, is through a grant of transactional immunity.[27]

The petitioners in *Kastigar* initially asserted that the Fifth Amendment's privilege against compulsory self-incrimination deprives Congress of any power to enact a law compelling a witness to testify about his own allegedly illegal conduct, even if complete immunity from prosecution is given.[28] Such an attack on immunity statutes in general is not

22. 406 U.S. at 453. Zicarelli v. New Jersey Investigation Comm'n, 406 U.S. 472 (1972), decided the same day, held the *Kastigar* decision to be applicable to state immunity statutes as well.

23. 406 U.S. at 462.

24. But see note 185 *infra.*

25. 406 U.S. at 462-63, *citing* Piccirillo v. New York, 400 U.S. 548, 549 (1971) (Brennan, J., dissenting), *and* Ullmann v. United States, 350 U.S. 422, 440 (1956) (Douglas, J., dissenting). Justice Douglas has long maintained that immunity statutes are *per se* unconstitutional. See text accompanying notes 50-67 *infra.*

26. 406 U.S. at 468.

27. *Id.* at 469. Justice Brennan is already on record as being opposed to the adoption of use and derivative use immunity as the standard required by the Fifth Amendment. He feels that transactional immunity is required to adequately replace the privilege against self-incrimination. Piccirillo v. New York, 400 U.S. 548, 562 (1971) (dissenting opinion).

28. 406 U.S. at 448. "Incriminate" has two meanings which could result in different interpretations of the Fifth Amendment. The first is that "incriminate" means "[t]o charge with crime; to expose to an accusation or charge of crime; to involve oneself or another in a criminal prosecution or the danger thereof." BLACK'S LAW DICTIONARY 908 (rev. 4th ed. 1968). The majority of the Court accept this as the meaning intended by the writers of the Constitution, and therefore they feel the Constitution only prohibits the compulsion of testimony resulting in a criminal prosecution. The second interpretation is that "incriminate" means "to involve in, or make appear guilty of,

a new one. It was attempted unsuccessfully in *Brown v. Walker*[29] and in *Ullmann v. United States*.[30] The *Kastigar* Court dismissed the petitioners' argument in one sentence: "We find no merit to this contention and reaffirm the decisions in *Brown* and *Ullmann*."[31]

The weight of authority and history supports the Court's conclusion. The privilege against self-incrimination embodied in the Fifth Amendment had its origin in the oath *ex officio*[32] which was established by the ecclesiastical courts of England in 1236.[33] Competing forces shaped the development of the oath. On one side was the Church and its desire to hold unrestricted inquiries into the behavior and morals of its parishioners. On the other side was the sovereign and his wish to prohibit Church officials from compelling incriminatory testimony from his subjects. This conflict was resolved by the middle of the 18th Century when the English judiciary gave effect to the privilege against self-incrimination.[34]

The privilege was firmly established in the American colonies by 1789. The inequities resulting from forcing a person to incriminate himself motivated the colonists to incorporate the provision in the Fifth Amendment to the Constitution.[35] Thus, the maxim *nemo tenetur seipsum accusare*[36] "which in England was a mere rule of evidence

a crime or fault." *Webster's New World Dictionary* 1146 (Coll. ed. 1958). Similar is *Ballentine's Law Dictionary* 605 (3rd ed. 1969) which reads "[t]o make it appear that one is guilty of a crime." This is the interpretation apparently adopted by the petitioners.

29. 161 U.S. 591 (1896).

30. 350 U.S. 422 (1956).

31. 406 U.S. at 448.

32. The oath required a person to answer all questions put to him by church officials without presentment or accusation. Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1 (1949). *See generally* E. LEVY, ORIGINS OF THE FIFTH AMENDMENT (1968); E. GRISWOLD, THE FIFTH AMENDMENT TODAY (1955); 8 J. WIGMORE, EVIDENCE § 2250, at 270 (McNaughton rev. ed. 1961) [hereinafter cited as WIGMORE]; PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: ORGANIZED CRIME 85-86 (1967) [hereinafter cited as ORGANIZED CRIME]; Note, 3 SETON HALL L. REV. 199, 200-01 (1971); Note, *Compulsory Immunity Legislation: Title II of the Organized Crime Control Act of 1970*, 1971 ILL. L. REV. 91, 92; Rief, *The Grand Jury Witness and Compulsory Testimony Legislation*, 10 AM. CRIM. L. REV. 829, 843-45 (1972).

33. Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1 (1949).

34. For a more detailed discussion of the development of the privilege in the United States, *see* Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763 (1935). *See generally* Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 MICH. L. REV. 191 (1930).

35. Note, 3 SETON HALL L. REV. 199, 201 (1971).

36. "No one is bound to accuse himself." BLACK'S LAW DICTIONARY 1191 (rev. 4th ed. 1968).

became clothed in this country with the impregnability of a constitutional enactment."[37]

Only a relatively short period of time elapsed after the development of the privilege in England before various methods evolved to circumvent its impact.[38] A notable example occurred in the *Trial of Lord Chancellor Macclesfield*[39] in 1725. The Chancellor was accused of trafficking in public offices. In order to obtain testimony against the Chancellor from those who had collaborated with him, Parliament passed an act to immunize the then Masters in Chancery from prosecution for their involvement. Once the criminality was taken away by statute, it was felt that the privilege against self-incrimination was no longer applicable.[40] It was soon learned that the same result could be achieved by granting royal pardons. This English tradition of bypassing the privilege through "decriminalization" of the witness' conduct carried over into the jurisprudence of the United States.[41]

Grants of immunity, especially in such areas as the prosecution of organized crime, are vitally important to our present system of law enforcement.[42] The Supreme Court has consistently recognized the effectiveness and often the necessity of immunity statutes in obtaining the revelation of needed information in administrative, congressional and judicial investigations.[43]

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37. Brown v. Walker, 161 U.S. 591, 597 (1896).

38. ORGANIZED CRIME, *supra* note 32, at 86.

39. 16 How. St. Tr. 767, 921, 1147 (1725).

40. *See* Hale v. Henkel, 201 U.S. 43, 67 (1906).

41. 8 WIGMORE, *supra* note 32, § 2281, at 493. A brief history of American immunity legislation can be found in Wendel, *Compulsory Immunity Legislation and the Fifth Amendment Privilege: New Developments and New Confusions*, 10 ST. LOUIS U.L.J. 327 (1966). *See also* Dixon, *The Fifth Amendment Privilege and Federal Immunity Statutes*, 22 GEO. WASH. L. REV. 447 (1954); Duncan, *Federalism and the Fifth: Configurations of Grants of Immunity*, 12 U.C.L.A.L. REV. 561 (1965); ORGANIZED CRIME, *supra* note 32, at 86-88.

42. ORGANIZED CRIME, *supra* note 32, at 80, points out:

> Above all else, the testimony of witnesses is indispensable in the prosecution of organized crime. The existing legal tools available to develop such testimony need to be strengthened, and alternatives need to be sanctioned. . . . Immunity grant and similar legislation must be broadened.

43. In Murphy v. Waterfront Comm'n, 378 U.S. 52, 93-95 (1964) (concurring opinion), Justice White observed:

> Among the necessary and most important of the powers of the States as well as the Federal Government to assure effective functioning of government in an ordered society is the broad power to compel residents to testify in court or before grand juries or agencies. . . . (Immunity statutes) have for more than a century been resorted to for the investigation of many offenses, chiefly those whose proof and punishment were otherwise impracticable. . . . This Court, in dealing with federal immunity acts, has on numerous occasions characterized such statutes as absolutely essential to the enforcement of various federal regulatory acts.

Furthermore, the courts have recognized that testimony adverse to the witness can be compelled in certain situations even without a grant of immunity. This is based on the premise that, "if the testimony sought cannot possibly be used as a basis for, or in aid of, a criminal prosecution against the witness, the [Fifth Amendment] ceases to apply . . . ."[44] The first of these situations is where prosecution for a crime is barred by the statute of limitations.[45] The second is where the witness has already been convicted of the crime to which his testimony relates.[46] The third is where a pardon has been granted to the witness.[47] And the fourth is where, although a crime has been committed, the penalty for the offense has been repealed.[48] The rationale for disallowing a claim of the constitutional privilege in these situations is that the witness' disclosure cannot prejudice him since he is no longer subject to criminal prosecution.[49]

Notwithstanding the long and consistent history of immunity statutes, they have not been without critics. Although not the basis for his dissent in *Kastigar,* Justice Douglas had previously indicated his belief that no immunity grant is coextensive with the privilege against self-incrimination. In his dissent in *Ullmann v. United States*[50] he pointed out that there are three areas not covered by the immunity grant which are shielded by absolute silence. First, the witness is not immune to *attempted* prosecution:[51]

[A]ll that can be said is, that the witness is *not* protected, by the pro-

See also Hale v. Henkel, 201 U.S. 43, 70 (1906); Brown v. Walker, 161 U.S. 591, 610 (1896).

44. Brown v. Walker, 161 U.S. 591, 597 (1896).

45. *Id.* at 598.

46. In United States v. Romero, 249 F.2d 371 (2d Cir. 1957), the court of appeals declared:

> It is well established that once a witness has been convicted for the transactions in question, he is no longer able to claim the privilege of the Fifth Amendment and may be compelled to testify. *Id.* at 375.

47. Brown v. Walker, 161 U.S. 591, 599 (1896).

48. Moore v. Backus, 78 F.2d 571, 577 (7th Cir. 1935).

49. *See* Ellis v. United States, 416 F.2d 791, 800-02 (D.C. Cir. 1969). *See also* Moore v. Backus, 78 F.2d 571, 577 (7th Cir. 1935), wherein it was pointed out:

> The rule is that if the offense is outlawed or pardoned, or the criminal liability therefor has been removed by statutory enactment, then the interrogated party cannot claim the constitutional protection.

50. 350 U.S. 422, 440 (1956).

51. *Id.* at 443. In *Kastigar,* Justice Douglas considered the Fifth Amendment's requirement that no one be compelled "to be a witness against himself" to mean no person should be "compelled to admit guilt." To admit guilt for a criminal act and open oneself to any shame therefrom is being a witness "against oneself." Under a grant of any kind of immunity, the witness would be forced to admit his guilt and thus Justice Douglas objects to all forms of immunity statutes. 406 U.S. at 467.

> vision in question, from being *prosecuted,* but that he has been furnished with a good plea to the indictment, which will secure his acquittal. But is that true? Not unless the plea is sustained by competent evidence. His condition, then, is that he has been prosecuted, been compelled, presumably, to furnish bail, and put to the trouble and expense of employing counsel and furnishing the evidence to make good his plea.[52]

Thus, even if complete immunity from prosecution is granted, the testimony coerced from the witness may be used in an attempt to prosecute him, and, even though the attempt should prove to be unsuccessful, he would be forced to employ counsel, furnish bail, and be put to numerous other expenses and inconveniences. This is less likely to occur if no incriminating testimony is forced from the witness at all. Justice Douglas concluded that "the privilege of silence is exchanged for a partial, undefined, vague immunity. It means that Congress has granted far less than it has taken away."[53]

However, fear of prosecution is a harm which is not recognized by the law. The possibility exists that any person, no matter how innocent, may be confronted with a civil or criminal prosecution and be put to the inconvenience and expense of defending himself. The person has no remedy against the prosecutor unless the prosecution was malicious, except insofar as he may recover his court costs.[54]

The second area felt by Justice Douglas to be not fully protected by immunity statutes is the witness' "conscience and human dignity and freedom of expression."[55] Prying open the lips of an accused violates the witness' conscience and should be prohibited. It was argued by Justice Field, dissenting in *Brown,* that there is an "essential and inherent cruelty" in forcing self-accusation.[56] There has been no real response to this suggestion. The majority opinions in *Brown* and *Ullmann* apparently rejected it by simply ignoring it. Perhaps such an argument could be made whenever a man is forced to do anything contrary to his will or desire, which would encompass virtually every law that has been made. And the Sixth Amendment[57] specifically provides

52. 350 U.S. at 443-44, quoting Brown v. Walker, 161 U.S. 591, 621 (1896) (Shiras, J., dissenting).

53. 350 U.S. at 445.

54. Brown v. Walker, 161 U.S. 591, 608 (1896); *see* 8 WIGMORE, *supra* note 32, § 2281, at 494.

55. 350 U.S. at 445.

56. 161 U.S. at 637.

57. In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . . U.S. CONST. amend. VI.

that a person may be compelled to be a witness against another, even if his conscience tells him that he should not testify.[58]

The final argument against immunity statutes raised by Justice Douglas in *Ullmann* is based on the theory that the privilege against self-incrimination "protect[s] the accused from all compulsory testimony 'which would expose him to infamy and disgrace,' as well as that which might lead to a criminal conviction."[59] This view prevailed in England as early as 1696, when Lord Chief Justice Treby declared that "no man is bound to answer any questions that will subject him to a penalty, *or to infamy.*"[60] This same thesis was advanced by District Judge Grosscup in *United States v. James.*[61] In reviewing the "history of the reign of intolerance that once ruled England, the contests between the Church and State, and the cruelties of some of the old legal procedures,"[62] Judge Grosscup made the following statement regarding the aims of the Framers in drafting the Fifth Amendment:

> Did they originate such privilege simply to safeguard themselves against the law-inflicted penalties and forfeitures? Did they take no thought of the pains of practical outlawry? The stated penalties and forfeitures of the law might be set aside; but was there no pain in disfavor and odium among neighbors, in excommunication from church or societies that might be governed by the prevailing views, in the private liabilities that the law might authorize, or in the unfathomable disgrace, not susceptible of formulation in language, which a known violation of law brings upon the offender? Then, too, if the immunity was only against the law-inflicted pains and penalties, the government could probe the secrets of every conversation, or society, by extending compulsory pardon to one of its participants, and thus turn him into an involuntary informer. Did the framers contemplate that this privilege of silence was exchangeable always, at the will of the government, for a remission of the participant's own penalties, upon a condition of disclosure, that would bring those to whom he had plighted his faith and loyalty within the grasp of the prosecutor? I cannot think so.[63]

Under this view, although a witness' compelled testimony may not lead

58. The fact that a person may be compelled to be a witness, however, does not preclude the refusal of the witness to answer questions on the ground of the Fifth Amendment privilege.

59. 350 U.S. at 449, *quoting* Brown v. Walker, 161 U.S. 591, 631 (1896) (Field, J., dissenting).

60. 350 U.S. at 453, *quoting* Trial of Freind, 13 How. St. Tr. 1, 17 (1696) (emphasis added).

61. 60 F. 257 (N.D. Ill. 1894).

62. 350 U.S. at 449 (Douglas, J., dissenting).

63. 60 F. at 264.

to a criminal prosecution or conviction, it nonetheless may lead to the infliction of "punishment." Justice Douglas maintained that the history of infamy as punishment is well known and that the loss of office or dignity was a common feudal form of punishment:[64] "Infamy was historically considered to be punishment as effective as fine and imprisonment."[65] In Justice Douglas' view, expressed in his dissent in *Ullmann,* the above described attitude towards infamy "was part of the background of the Fifth Amendment"[66] and was explicitly written into the privilege against self-incrimination by the reference, in the first clause of the Fifth Amendment, to holding a person for "a capital or otherwise *infamous* crime," considered along with the clause relating to being a "witness against himself." This, according to Justice Douglas, "reflects the revulsion of society at the infamy imposed by the state."[67]

64. 350 U.S. at 450-51; *see* Franklin, *Encyclopédiste Origin of the Fifth Amendment,* 15 LAW. GUILD REV. 41 (1955).

65. 350 U.S. at 451. The use of infamy as a sanction in Roman law is described in Tatarczuk, *Infamy of Law,* in CANON LAW STUDIES No. 357, 1-13 (The Catholic University of America 1954).

66. 350 U.S. at 451.

67. *Id.* at 452. Another argument advanced against immunity statutes has been that there are many "disabilities" that attach to a person who is compelled to testify as to his criminal activities and that these disabilities are forfeitures which are within the protection of the Fifth Amendment's privilege against self-incrimination. 350 U.S. at 440-41. As stated in Boyd v. United States, 116 U.S. 616 (1886), "[a] witness . . . is protected by the law from being compelled to give evidence that tends to incriminate him, *or subject his property to forfeiture.*" *Id.* at 638 (emphasis added).

The case of Ullmann v. United States, 350 U.S. 422 (1956), provides an example of the punishing effect that such disabilities can have on a witness who is compelled to testify, even though his testimony does not lead to a prosecution or a conviction. In *Ullmann,* the witness was asked various questions by the grand jury relating to his membership in the Communist Party. When he invoked his privilege against self-incrimination, the United States Attorney granted him transactional immunity pursuant to the terms of the Immunity Act of 1954, 18 U.S.C. § 3486 (1954). Regardless of whether the witness' testimony tended to incriminate him, various disabilities, created by federal law, attached to him if he admitted that he was a Communist. These disabilities included "ineligibility for employment in the federal government and in defense plants" (50 U.S.C. § 784 (1970)) and the possibility of being interned (*id.* § 785). If such disabilities are forfeitures they would come within the protection of the Due Process Clause of the Fifth Amendment. Therefore, a witness should not be compelled to testify when such disabilities would result. Justice Douglas felt these disabilities to be forfeitures and thus as much protected against by the Fifth Amendment as criminal prosecutions. 350 U.S. at 440-41.

In Boyd v. United States, 116 U.S. 616 (1886), the United States Supreme Court said that compelling a witness to disclose evidence that tends to subject his property to forfeiture

> is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom. *Id.* at 632.

The existing law, however, is firmly established that the mere fact that immunity statutes "fail to shield the witness against the personal disgrace that often is an incident of the revelation of one's connections with a crime, does not render the immunity inadequate in a constitutional sense."[68] Wigmore has suggested that such a view as that adopted by Justice Douglas ignores "the independence in principle, in details, and in history" of the privilege against disclosure of facts involving disgrace and the privilege against self-incrimination. The privilege against forced disclosure of disgraceful or infamous facts became recognized after and independently of the privilege against self-incrimination. Its limitations were entirely distinct, neither covering facts tending merely to disclose infamy, nor applying to facts material to the issues. It only applied to facts which absolutely would disclose infamy and which were collateral facts, facts solely affecting credibility.[69]

Since before the turn of the century, immunity statutes *per se* have been upheld as being constitutionally permissible.[70] The *Kastigar* Court noted that prior to the enactment of 18 U.S.C. §§ 6002-03 over fifty federal immunity statutes were in force and that every state had one or more such statutes.[71] Thus the Court concluded that "such statutes have 'become part of our constitutional fabric.' "[72]

Having failed to persuade the Court that immunity statutes are *per se* unconstitutional, the petitioners next contended that the "use and derivative use" immunity provided by 18 U.S.C. § 6002 "is not co-extensive with the scope of the Fifth Amendment privilege against compulsory self-incrimination, and therefore is not sufficient to supplant the privilege and compel testimony over a claim of the privilege."[73] They relied heavily on *Counselman v. Hitchcock*[74] to support their argu-

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Justice Douglas suggested that "[t]he forfeiture of property on compelling testimony is no more abhorrent than the forfeiture of the rights of citizenship," the right to a job, the right to a passport or the right to not be subject to the risk of internment. He also stated that "[w]hen a man loses a job because he is a Communist, there is as much a penalty suffered as when an importer loses property because he is a tax evader." 350 U.S. at 442.

68. Smith v. United States, 337 U.S. 137 (1949).

69. 8 WIGMORE, *supra* note 32, § 2255, at 332.

70. *See, e.g.*, Gardner v. Broderick, 392 U.S. 273, 276 (1968); Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964); Ullmann v. United States, 350 U.S. 422 (1956); McCarthy v. Arndstein, 266 U.S. 34, 42 (1924); Heike v. United States, 227 U.S. 131, 142 (1913); Brown v. Walker, 161 U.S. 591 (1896).

71. 406 U.S. at 447.

72. *Id., quoting* Ullmann v. United States, 350 U.S. 422, 438 (1956).

73. 406 U.S. at 448.

74. 142 U.S. 547 (1892).

ment. *Counselman* was the first Supreme Court case in which a constitutional challenge to an immunity statute was examined. Counselman, a dealer in grain, was questioned by the Interstate Commerce Commission regarding rate rebates. He invoked his privilege against self-incrimination and was granted immunity by the Commission pursuant to an 1868 statute providing for immunity only from the use of the specific testimony compelled from the witness—use immunity.[75] Notwithstanding the grant of immunity, Counselman continued his refusal to answer questions and was convicted of contempt of court. On review, the *Counselman* Court found the statute to be too narrow to supplant the privilege against self-incrimination because it could not "prevent the use of the witness' testimony to search out other testimony to be used in evidence against him . . . ."[76] The Court could have limited its decision to its finding that the witness was not protected from the use of the *fruits* of his testimony, striking down the immunity statute involved on that basis alone. However, the Court, noting that for an immunity statute to be upheld it must afford a protection that is coextensive with the privilege,[77] concluded:

> [The immunity statute] does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, *must afford immunity against future prosecution for the offense to which the question relates.*[78]

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75. 142 U.S. at 560-61. The immunity statute, Revised Statutes, pt. 1, § 860, 18 Stat. 163 (1878), provided that:

> No pleading of a party, nor any discovery or evidence obtained from a party or a witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture: *Provided,* That this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid.

76. 142 U.S. at 564.

77. *Id.* at 565.

78. *Id.* at 585-86 (emphasis added). Although *Counselman* was the first time the United States Supreme Court ruled on the constitutionality of a compulsory testimony statute, this issue had been raised in several state court proceedings. The state court decisions were split between those that upheld the constitutionality of use immunity statutes, (*e.g.*, People v. Kelly, 124 N.Y. 74 (1861); Wilkins v. Malone, 14 Ind. 153 (1860); *Ex parte* Rowe, 7 Cal. 184 (1887); State v. Quanlos, 13 Ark. 307 (1853)) and those that held that immunity statutes providing immunity from only the use of the compelled testimony, and not from the fruits derived therefrom, were constitutionally insufficient for failing to provide for complete immunity from prosecution for the crimes disclosed by the compelled testimony (e.g., State v. Norwell, 58 N.H. 314 (1878); Cullen v. Commonwealth, 65 Va. (24 Gratt.) 624 (1873); Emery's Case,

In response to the standard of "absolute immunity" enunciated in *Counselman*, Congress enacted a new immunity statute.[79] This statute granted immunity from prosecution rather than mere immunity from use or derivative use of the compelled testimony.[80] The constitutionality of the statute was barely sustained in *Brown v. Walker*,[81] and it became the basic form for the numerous federal immunity statutes until 1970 when Congress enacted the statute involved in *Kastigar*.

The *Kastigar* majority, however, swept aside the "absolute immunity" language in *Counselman* by characterizing it as dicta.[82] There are statements in *Counselman* itself which support such a view. Justice Blatchford, writing for the majority, had enumerated the problems in the statute before the Court:

> It could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted.[83]

These statements and other similar statements, together with the fact that *Counselman* had involved a mere use immunity statute, do tend to weaken the authority of *Counselman's* absolute immunity language. Nevertheless, both Congress and the courts, until recently, apparently felt that the absolute immunity language was the essence of the *Counsel-*

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107 Mass. 172 (1871)). After noting (142 U.S. at 563-85) the existence of this dichotomy in the state courts, the *Counselman* Court explicitly chose to follow the line of decisions requiring transactional immunity. It would not appear the Court was aware of the middleground afforded by use and derivative use immunity, but rather conceived of transactional immunity as the only alternative to use immunity.

79. Act of Feb. 11, 1893, ch. 83, 27 Stat. 443. It was argued at the introduction of the bill that enforcement of the Interstate Commerce Act would be impossible in the absence of an effective immunity statute. The bill was drafted specifically to meet the broad language in *Couselman*. *See* 23 CONG. REC. 573, 633 (1892); 24 CONG. REC. 503 (1893).

80. Act of Feb. 11, 1893, ch. 83, 27 Stat. 443. See note 21 *supra*. This statute was repealed by section 245 of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, tit. II, § 245 (Oct. 15, 1970).

81. 161 U.S. 591 (1896). The four dissenting justices contended that even transactional immunity was not broad enough to be coextensive with the Fifth Amendment privilege. Since *Brown*, however, the principle that government can use an immunity grant to compel incriminating testimony has not been successfully challenged. *E.g.*, Reina v. United States, 364 U.S. 507 (1960); Ullmann v. United States, 350 U.S. 422 (1956).

82. 406 U.S. at 454-55.

83. 142 U.S. at 564.

man decision. For example, in *Hale v. Henkel*,[84] the transactional immunity standard was upheld because it removed the criminality (the threat of prosecution) and "if the criminality has already been taken away, the [Fifth] amendment ceases to apply."[85] In *McCarthy v. Arndstein*,[86] Justice Brandeis declared that the privilege against self-incrimination was still available to the witness because the statute involved failed "to afford complete immunity from prosecution."[87] In *United States v. Murdock*,[88] the Court remarked that "full and complete immunity against prosecution by the government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination."[89] Similarly, the Court declared in *United States v. Monia*[90] that *Counselman* "indicated clearly that nothing short of absolute immunity would justify compelling the witness to testify if he claimed the privilege" against self-incrimination.[91]

The *Kastigar* Court, however, disposed of such statements in the same way that it had disposed of the language in *Counselman* itself by noting that none of the cases had involved a use and derivative use immunity statute.[92] *Hale* and *Monia* concerned statutes which provided for full transactional immunity.[93] *Murdock* involved an attempt to invoke the Fifth Amendment to prevent self-incrimination under state law[94] prior to the time the Fifth Amendment was made applicable to the states.[95] The statute in *McCarthy* afforded no immunity whatsoever.[96] Other cases employing the *Counselman* language were distinguished on similar grounds.[97] In essence, Justice Powell was able to bypass decades of adherence to the transactional immunity standard enunciated in *Counselman* because the clear import of the language in *Counselman* had dissuaded Congress from attempting to devise an immunity statute

84. 201 U.S. 43 (1906).
85. *Id.* at 67.
86. 266 U.S. 34 (1924).
87. *Id.* at 42.
88. 284 U.S. 141 (1931).
89. *Id.* at 149.
90. 317 U.S. 424 (1943).
91. *Id.* at 428; *see* Albertson v. Subversive Activities Control Board, 382 U.S. 70, 81 (1965); Adams v. Maryland, 347 U.S. 179, 182 (1954); Smith v. United States, 337 U.S. 137, 146 (1949).
92. 406 U.S. at 455 n.39.
93. *Id.*
94. 284 U.S. at 149.
95. More precisely, *Murdock* involved a challenge to the "silver-platter doctrine" discussed in the text accompanying notes 102-07 *infra*.
96. 266 U.S. at 42.
97. 406 U.S. at 455 n.39. Most of the cases are listed in note 91 *supra*.

which provided for anything less than full transactional immunity.[98] The factual situations after *Counselman* thus either involved transactional immunity statutes enacted subsequent to *Counselman,* use immunity statutes enacted prior to *Counselman,* or statutes, whenever enacted, which failed to provide any immunity at all. By a strange twist of fate, the great deference accorded to the *Counselman* absolute immunity language eventually proved to be its undoing, as it left the precise question of the constitutionality of use and derivative use immunity open for decision eighty years later by a Court with quite different notions concerning immunity legislation. The *Kastigar* Court was free to conclude that:

> The statute's explicit proscription of the use in any criminal case of "testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information)" is consonant with Fifth Amendment standards. We hold that such immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege. While a grant of immunity must afford protection commensurate with that afforded by the privilege, it need not be broader. . . . [Use and derivative use immunity] prohibits the prosecutorial authorities from using the compelled testimony in *any* respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness.[99]

Justice Powell relied on *Murphy v. Waterfront Commission*[100] for authority for the proposition that use and derivative use immunity is not *per se* unconstitutional. In *Murphy,* the petitioners refused to answer certain questions in a hearing conducted by the bi-state Waterfront Commission of New York Harbor.[101] They were granted complete immunity from prosecution under the laws of New York and New Jersey. But the petitioners continued their refusal, arguing that the states' grant of immunity would not prevent their testimony from being used by federal authorities, and they were subsequently adjudged to be

98. In the seventy-eight years between *Counselman* and the enactment or 18 U.S.C. §§ 6002-03 in 1970, Congress enacted approximately seventy immunity provisions into various federal statutes and, with few exceptions, every provision has provided for nothing less than transactional immunity. 18 U.S.C. §§ 6002-03 replaced substantially all of these immunity statutes. Pub. L. No. 91-452, § 202-58 (Oct. 15, 1970).

99. 406 U.S. at 453.

100. 378 U.S. 52 (1964).

101. The Waterfront Commission of New York Harbor is a bistate body established under an interstate compact between New York and New Jersey and approved by Congress. 67 Stat. 541 (1953).

in civil and criminal contempt.[102] The petitioners fears were based on prior Court decisions which had upheld the delivery "on a silver platter" of self-incriminating statements compelled by a state, with or without a grant of immunity (the Fifth Amendment not yet having been held applicable to the states), to federal authorities for use in a federal criminal proceeding against the witness.[103]

The continued viability of this "silver platter" doctrine was questionable following the Court's decision in *Malloy v. Hogan,*[104] which held the Fifth Amendment applicable to the states through the Fourteenth Amendment.[105] The *Murphy* Court did away with the doctrine and held that, once New York and New Jersey had granted immunity to the witness, the federal government could not use the compelled testimony or its fruits against him.[106] Significantly, however, the Court ruled that the federal authorities could still prosecute the witness for a federal crime related to the transaction for which New York and New Jersey had granted transactional immunity if the federal prosecution was based upon completely independent evidence.[107]

The *Kastigar* majority recognized that *Murphy,* unlike the present case, did not involve a situation where the jurisdiction seeking to compel the testimony had granted only use and derivative use immunity.[108] Nevertheless, the Court pointed out, the *Murphy* decision had allowed the Fifth Amendment privilege to be supplanted by what was in effect use and derivative use immunity insofar as the *non-compelling* jurisdiction was concerned. Theoretically, there is nothing in the Fifth Amendment that should hold the *compelling* jurisdiction to any broader standard:

> [B]oth the reasoning of the Court in *Murphy* and the result reached compel the conclusion that use and derivative use immunity is constitutionally sufficient to compel testimony over a claim of the privilege. Since the privilege is fully applicable and its scope is the same whether invoked in a state or federal jurisdiction, the *Murphy* conclusion that a prohibition on use and derivative use secures a witness' Fifth Amendment privilege against infringement by the Federal Government demonstrates that immunity from use and derivative use is coextensive with

102. 378 U.S. at 52-54.
103. Feldman v. United States, 322 U.S. 487 (1944); United States v. Murdock, 284 U.S. 141 (1931).
104. 378 U.S. 1 (1964).
105. *Id.* at 6.
106. 378 U.S. at 79-80.
107. *Id.* at 79.
108. 406 U.S. at 457.

> the scope of the privilege. . . . This protection coextensive with the privilege is the degree of protection which the Constitution requires, and is all that the Constitution requires even against the jurisdiction compelling testimony by granting immunity.[109]

Justice Douglas, in his dissent, objected to the *Kastigar* majority's reliance on *Murphy* as authority for undercutting the absolute immunity language used in *Counselman* and its progeny. He argued that the immunity standard approved in *Murphy* was the result of consideration of a problem entirely different than the one posed in *Counselman*:

> *Counselman*, as the *Murphy* Court recognized, "said nothing about the problem of incrimination under the law of another sovereign." That problem is one of federalism, as to require transactional immunity between jurisdictions might "deprive a state of the right to prosecute a violation of its criminal law on the basis of another state's grant of immunity [a result which] would be gravely in derogation of its sovereignty and obstructive of its administration of justice."[110]

As Justice White's concurring opinion in *Murphy* had clearly pointed out, serious federal-state problems would be created if the Fifth Amendment were held to require immunity from *prosecution* in one jurisdiction because a witness had been compelled, under grant of immunity, to testify in another jurisdiction.[111] Since states are without authority to grant immunity from federal prosecution, a rule requiring transactional immunity would invalidate the immunity statutes of the fifty states in any case where there was a possibility of federal prosecution. Justice White had explained that:

> [Transactional immunity] would not only require widespread federal immunization from prosecution in federal investigatory proceedings of persons who violated state criminal laws, regardless of the needs or wishes of local law enforcement officials, but would also deny the States the power to obtain information necessary for state law enforcement and state legislation.[112]

Such a drastic result, Justice White had concluded, should not be imposed on the noncompelling jurisdiction, which has had absolutely no say in determining whether or not the desired testimony is worth an absolute grant of immunity, unlike the situation where only a single jurisdiction is involved:

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109. *Id.* at 458-59 (footnotes omitted).

110. *Id.* at 463-64 (citations omitted), *quoting* United States *ex rel.* Catena v. Elias, 449 F.2d 40, 44 (3d Cir. 1971).

111. 378 U.S. at 92.

112. *Id.* at 93.

> [W]here there is only one government involved, be it state or federal, not only is the danger of prosecution more imminent and indeed the likely purpose of the investigation to facilitate prosecution and conviction, *but that authority has the choice of exchanging immunity for the needed testimony.*[113]

Justice Douglas further contended that proof that *Murphy* was not intended to undercut *Counselman* or modify the transactional immunity standard in cases involving only one jurisdiction might be seen in *Albertson v. Subversive Activities Control Board*,[114] decided one year after *Murphy* by essentially the same Court.[115] In *Albertson*, the Court unanimously held that section 4(f) of the Subversive Activities Control Act of 1950[116] was unconstitutional, using the following analysis:

> In *Counselman v. Hitchcock*, decided in 1892, the Court held "that no [immunity] statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege . . . ," and that such a statute is valid only if it supplies "a complete protection from all the perils against which the constitutional prohibition was designed to guard . . ." by affording "absolute immunity against future prosecution for the offense to which the question relates." *Measured by these standards*, the immunity granted by § 4(f) is not complete.[117]

The *Alberston* language does strongly support Justice Douglas' position. Unfortunately, however, as with the other cases previously discussed which contained such statements,[118] the language is dicta insofar as the question of use and derivative use immunity is concerned, since the statute invalidated in *Albertson* granted mere use immunity.[119] The *Kastigar* majority thus did not find it difficult to dismiss the *Albertson* decision.[120]

It would seem that Justice Douglas is probably correct in asserting that the existence of extremely difficult federal-state problems was the overriding reason the *Murphy* Court held that only use and derivative use immunity was required to be imposed on a non-compelling jurisdic-

113. *Id.* at 98 (emphasis added).

114. 382 U.S. 70 (1965).

115. The only difference in the Court was that in the intervening period Justice Goldberg resigned and was replaced by Justice Fortas.

116. Subversive Activities Control Act, ch. 1024, § 4(f), 64 Stat. 992 (1950), *as amended*, 50 U.S.C. § 783(f) (1970).

117. 382 U.S. at 80 (citations omitted and emphasis added), *quoting* Counselman v. Hitchcock, 142 U.S. 547 (1892).

118. See text accompanying notes 92-99 *supra*.

119. 382 U.S. at 80.

120. 406 U.S. at 455 n.39.

tion in multi-jurisdictional cases. The opinion in *Murphy* gave no indication that the transactional immunity standard would no longer be applicable when a federal witness was compelled to testify as to criminal activities which could be the subject of a federal prosecution. In fact, Justice White recognized that the Court was not deciding this question:

> Whatever may be the validity [of the transactional immunity language in *Counselman*] where the witness is being investigated by a grand jury for the purpose of indictment for a particular offense and where the grand jury proceedings are conducted by the same government attempting to obtain a conviction for the offense—the facts of *Counselman*—it clearly has no validity . . . where the inquiry does not concern any federal offense, no less a particular one, and the government seeking the testimony has no purpose or authority to prosecute for federal crimes.[121]

Nevertheless, even if the *Murphy* Court did not intend to affect the *Counselman* transactional immunity standard (an assumption which is difficult to avoid given the Court's subsequent language in *Albertson*), it did give constitutional approbation to a use and derivative use standard of immunity. *Theoretically,* therefore, it is difficult to argue with the *Kastigar* majority's extension of this narrower standard to the single jurisdiction situation—if the Fifth Amendment is not violated by the use of the standard in the multi-jurisdictional context, why should it be violated by the use of the standard in the single jurisdiction context?[122]

Having established a theoretical justification for the allowance of a use and derivative use immunity statute, the *Kastigar* majority finally turned to the petitioners' most forceful argument, the argument that, as a *practical* matter, use and derivative use immunity could not adequately protect them from various possible incriminating uses of the compelled testimony. The petitioners argued that such subtle uses as "obtaining leads, names of witnesses or other information not otherwise available" would be unsusceptible to proof by testimony or cross-examination, especially where the prosecuting jurisdiction granted the immunity.[123]

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121. Murphy v. Waterfront Comm'n, 378 U.S. 52, 106 (1964) (White, J., concurring).

122. The Court may have intended to retreat somewhat from its unequivocal assertion that *Murphy* "compelled" the result reached in *Kastigar* (406 U.S. at 458) when it suggested that "an analysis of prior decisions . . . *indicates* that use and derivative-use immunity is coextensive with the privilege." *Id.* at 459 (emphasis added).

123. *Id.* at 459.

The majority opinion rejected these arguments.[124] It maintained that the statute, in its literal terms, met constitutional requirements. The statute provides:

> [N]o testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case . . . .[125]

The Court referred to this statute as a "comprehensive safeguard," prohibiting the introduction of the witness' compelled testimony or any evidence directly or indirectly derived therefrom at a subsequent trial. The Court maintained that this prohibition explicitly barred, among other things, "the use of compelled testimony as an 'investigatory lead,' and . . . the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosure."[126]

The Court also asserted that a witness given immunity under the statute would not be "dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities."[127] Jusice Powell reaffirmed the standard for enforcement that was laid down in *Murphy*:

> Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence.[128]

This burden of proof cannot be met merely by the government's assertion that the evidence sought to be used is untainted. Rather, the prosecution is required to show affirmatively that its evidence is "derived from a legitimate source wholly independent of the compelled testimony."[129] Stressing the inviolability of this prohibition, Justice Powell concluded that use and derivative use immunity "leaves the witness and the prosecutorial authorities in *substantially* the same position as if the witness had claimed the Fifth Amendment privilege."[130]

Justice Marshall disagreed. He did not contest the majority's conclusion that use and derivative use immunity is theoretically sufficient.

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124. *Id.* at 459-61.
125. 18 U.S.C. § 6002 (1970); *see* note 10 *supra.*
126. 406 U.S. at 460.
127. *Id.*
128. *Id., quoting* Murphy v. Waterfront Comm'n, 378 U.S. at 79 n.18.
129. 406 U.S. at 460.
130. *Id.* at 462 (emphasis added).

However, in practice, such a standard would not insure that the witness would be left in the *precise* position he would have been in had he remained silent.[131] Contrary to the majority's conclusion, Justice Marshall argued that the efficacy of the use prohibition was inextricably tied to the "good faith" of the prosecutorial authorities:

> The information relevant to the question of taint is uniquely within the knowledge of the prosecuting authorities. They alone are in a position to trace the chains of information and investigation that lead to the evidence to be used in a criminal prosecution. A witness who suspects that his compelled testimony was used to develop a lead will be hard pressed indeed to ferret out the evidence necessary to prove it. And of course it is no answer to say he need not prove it, for though the Court puts the burden of proof on the government, the government will have no difficulty in meeting its burden by mere assertion if the witness produces no contrary evidence. The good faith of the prosecuting authorities is thus the sole safeguard of the witness' rights.[132]

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131. *Id.* at 468.

132. *Id.* at 469. A defendant's opportunity to prove derivative use is seriously impeded by his lack of access to most of the relevant information on the issue of taint because the prosecution alone knows the origins of its evidence. Other than being entitled to any exculpatory or mitigating evidence that the prosecution possesses (Brady v. Maryland, 373 U.S. 83 (1963)), a defendant in a criminal case does not have a constitutional right to discovery regarding the prosecution's case against him. Campbell v. United States, 365 U.S. 85 (1961). This is to preserve the adversary climate of the proceedings so that the ultimate truth will be revealed and will prevail. FED. R. CRIM. P. 16(a)(3) provides that the defendant has a right to a copy of his own grand jury testimony. He has no right to the full grand jury transcript. However, upon a showing of "particularized need" the federal courts may permit the defendant to inspect the entire transcript. Despite the recent expansion of a defendant's right to discovery in the federal courts provided by FED. R. CRIM. P. 16, the defendant's task of finding evidence of derivative use will not be facilitated because of the exemption proviso of section 16(b): ". . . this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses (other than the defendant) to agents of the government . . . ."

It is possible, however, that the *Jencks* rule would be of some assistance to a defendant attempting to find out if any tainted use was made of his immunized testimony. *See* 18 U.S.C. § 3500, a codification of the decision in the case of Jencks v. United States, 353 U.S. 657 (1957). The *Jencks* rule provides an exception to the general rule that in non-capital cases the government need not disclose its witnesses' identification nor the contents of any statements made by them prior to trial. After a government witness actually testifies at the defendant's trial, the prosecutor must allow the defendant, for purposes of cross-examination, to inspect that witness' pretrial testimony. Therefore, if the government calls before the court any witnesses or investigative agents for the purpose of assisting the government in meeting its burden of proof of showing the independent origin of its evidence the defendant would be entitled to such witnesses' pretrial testimony.

Justice Marshall further maintained that, even assuming the good faith of the prosecuting authorities, use and derivative use immunity is inadequate to guard against *unknowing* uses of the compelled testimony. What may appear to be independently derived evidence could be the direct result of a prohibited use concealed somewhere within the institutionalized investigative and prosecutorial apparatus.[133] To illustrate this point, he reminded the majority of the factual circumstances which had led to the Court's decisions in *Santobello v. New York* [134] and *Giglio v. United States.*[135] In *Santobello,* the defendant entered a plea of guilty in exchange for the prosecuting attorney's promise that he would not make a recommendation to the judge as to the sentence to be imposed. However, a different prosecuting attorney appeared to try the case and, being unaware of his colleague's commitment, recommended

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Moreover, the defendant may possibly be able to gain complete access to the government's files under the doctrine laid down in the decision of Alderman v. United States, 394 U.S. 165 (1969). The Court in that case stated:

> The trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was the fruit of the poisonous tree. This leaves ample opportunity to the Government to convince the trial court that its proof had an independent origin. *Id.* at 183, *quoting* Nordone v. United States, 308 U.S. 338, 341 (1939).

In *Alderman,* the defendant was convicted and he subsequently discovered that the government had used wiretaps in investigating his case. The Court remanded the case to the district court to determine the legality of the wiretap. The Court directed that, if the lower court found that the wiretaps were illegal, the government would have to turn over to the defendant *all* of its records regarding the surveillance so that he could ascertain whether any of the evidence introduced by the government at the trial was related to the information acquired by the wiretap.

The immediate question concerns the applicability of the *Alderman* rule to immunity cases like *Kastigar.* In both situations, the government must build its case on independently derived evidence. In the wiretap situation, the government cannot use any evidence obtained by an unconstitutional wiretap. In immunity cases, the government cannot use the witness' compelled testimony nor any evidence derived therefrom. In either situation the defendant can have evidence excluded from the case by showing that it is related to the illegal wiretap (in surveillance cases) or related to his compelled testimony (in immunity cases). Unless the defendant is to rely on the good faith of the prosecuting authorities (an assumption specifically rejected by the *Kastigar* Court), it would seem that he must be given access to the relevant records if he is to be able to prove prohibited conduct. Thus, in *Alderman,* the government was required to produce its surveillance records for the inspection of the defendant. Presumably, the defendant in immunity cases should have equal access to the prosecution's records in order to argue against the government's assertion of an independent origin for the evidence that was produced at trial. Otherwise, the defendant would be deprived of the only source of information relevant to contesting the government's assertion.

133. 406 U.S. at 469.

134. 404 U.S. 257 (1971).

135. 405 U.S. 150 (1972).

the maximum sentence.[136] The Court concluded that the "interests of justice and appropriate recognition of the duties of the prosecution" compelled the remand of the case for the state court to decide whether to specifically enforce the plea agreement or to allow the defendant to withdraw his guilty plea.[137] In *Giglio,* the defendant was convicted almost entirely on the basis of a co-conspirator's testimony. The defendant and the prosecuting attorney were without knowledge of the fact that this testimony had been solicited pursuant to a promise of immunity given by another government attorney at the time of the grand jury investigation. The Court, in reversing and ordering a new trial, held that this inadvertent suppression of material evidence violated due process.[138] Both *Santobello* and *Giglio* involved situations in which a prosecutor had infringed a defendant's rights by utilizing the prior work of another prosecutor in the same office without an adequate knowledge of the circumstances surrounding the development of that prior work and the limitations imposed on its use. Such situations are likely to occur much more often and to be much less detectable when the source of evidence is in dispute. Accordingly, Justice Marshall concluded that only transactional immunity could provide the required margin of protection when a single jurisdiction is involved.

However, Justice Marshall recognized that the practical considerations might vary in the multi-jurisdictional setting: "This case does not, of course, involve the special considerations that come into play when the prosecuting government is different from the government that has compelled the testimony."[139] Justice White, in his concurring opinion in *Murphy,* had suggested that unknowing and subtle uses would not readily occur where the questioning jurisdiction differs from the prosecuting jurisdiction since "[a]ccess and use require misconduct and collusion, a matter quite susceptible of proof."[140]

136. 404 U.S. at 259.

137. *Id.* at 262-63. Interestingly, the Court in reaching this result stated:

> The staff lawyers in a prosecutor's office have the burden of "letting the left hand know what the right hand is doing" or has done. That the breach of agreement was inadvertent does not lessen its impact. *Id.* at 262.

138. 405 U.S. at 152. The Court dismissed the government's argument that the promise was given without authority and that the evidence was not intentionally withheld:

> [W]hether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. . . . To the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it. *Id.* at 154.

139. 406 U.S. at 468 n.*.

140. 378 U.S. at 102.

The lower court decision in *United States v. McDaniel*[141] is illustrative of the greater protection afforded by use and derivative use immunity in the inter-jurisdictional situation. The factual situation in *McDaniel* was substantially identical to that in *Murphy*. In both cases the federal government was prosecuting a witness who had testified before a state grand jury and had been given transactional immunity by the questioning jurisdiction. However, there was one crucial difference between these cases. In *McDaniel,* the United States Attorney had obtained a copy of McDaniel's state grand jury testimony before McDaniel had been indicted by the federal government. Because of this single difference, the court of appeals held that McDaniel should be immune from federal prosecution for all the offenses related to his state grand jury testimony.[142] The court held that the federal prosecutor's receipt of the defendant's state grand jury testimony constituted a "prima facie 'use' of the testimony which is prohibited by the *Murphy* exclusionary rule."[143] The court concluded that, when the government saw McDaniel's state grand jury testimony, the privilege against self-incrimination had been violated because the witness and the federal government were no longer in "substantially the same position as if the witness had claimed his privilege in the absence of a state grant of immunity."[144] If McDaniel "had 'claimed his privilege in the absence of a state grant of immunity,' there would be nothing for the federal government to see."[145] In the *Murphy* situation, then, the United States Attorney who subsequently prosecutes the state grand jury witness cannot be present when the witness testifies before the state grand jury, nor can he have access to such testimony. If he obtains access, as in the *McDaniel* case, and makes any use of the information obtained, it would probably be through "misconduct and collusion, a matter quite susceptible of proof."[146]

In intra-jurisdictional cases like *Kastigar,* however, the prosecuting authorities at a subsequent trial of the grand jury witness will undoubtedly have had access to the witness' grand jury testimony.[147] An

141. 449 F.2d 832 (8th Cir. 1971).
142. *Id.* at 837.
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.* at 837-38.
147. Attorneys for the government, among others, may be present during the grand jury proceedings. FED. R. CRIM. P. 6(d). "Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties." FED.

obvious prospect is that, as the opportunities for access to the testimony increase, the likelihood of a prohibited use also increases. Even assuming the absence of purposive activity on the part of the prosecuting authorities, inadvertent reliance is a real threat which is not apparent in an inter-jurisdictional case. Justice Brennan, in his dissenting opinion in *Piccirillo v. New York*,[148] made the following comment regarding the inevitability of this type of threat:

> [A]ll the relevant evidence will obviously be in the hands of the government . . . . It assumes only the normal margin of human fallibility. Men working in the same office or department exchange information without recording carefully how they obtained certain information; it is often impossible to remember in retrospect how or when or from whom information was obtained. By hypothesis, the situation involves one jurisdiction with presumably adequate exchange of information among its various law enforcement officers. Moreover, the possibility of subtle inferences drawn from action or non-action on the part of fellow law enforcement personnel would be difficult if not impossible to prove or disprove.[149]

Commentators have suggested that to allow the government to learn the details of the witness' involvement in a crime for which he can be subsequently prosecuted greatly lessens the burden on the government in our adversary system to build a case completely on its own.[150] After the witness testifies, the prosecuting attorney then knows whether a case can be made against him and what evidence must be found from an independent source. In most instances, the government possesses some information concerning the involvement of the witness in criminal activities prior to compelling his testimony. Nevertheless, the *Kastigar* decision will undoubtedly create situations where "the decision to prosecute and therefore to create an independent source . . . would not have been made" but for the additional information and assurance gained from the compelled testimony.[151]

R. CRIM. P. 6(e). There is nothing in either of these sections that would indicate that the United States Attorney who interrogates a witness before the grand jury may not subsequently handle the prosecution of that witness. Nor do these sections, or any other sections of the Federal Rules of Criminal Procedure, lead to the conclusion that it is not permissible for the questioning attorney to release the records of the grand jury testimony to a prosecuting attorney. Accordingly, it is evident that a prosecuting attorney will have access to a defendant's grand jury testimony.

148. 400 U.S. 548 (1971).

149. *Id.* at 568.

150. Reif, *The Grand Jury Witness and Compulsory Testimony Legislation*, 10 AM. CRIM. L. REV. 829, 856-57 (1972).

151. *Id.* at 57; *see* Mansfield, *The Albertson Case: Conflict Between The Privilege*

Specifically referring to the exclusion of evidence derived from utilization of a witness' compelled testimony as an investigatory lead or as a basis for focusing the investigation on the witness, the *Kastigar* majority apparently believed that the burden of showing an independent source would preclude such subtle uses.[152] Justice Marshall, disagreeing, characterized the majority's "comprehensive safeguard" as merely a perfunctory burden met "by mere assertion if the witness produces no contrary evidence."[153] Interestingly, some commentators have viewed the *Murphy* rule in an entirely different light and have contended that it places an unduly *onerous* burden on the federal government, the effect of which was overlooked by Justice Goldberg's conclusion in *Murphy* that the rule "leaves the witness and the federal government in substantially the same position as if the witness had claimed his privilege in the absence of a state grant of immunity."[154] These commentators argue that, if no such immunity had been given, the federal government could prosecute without overcoming any burden of showing that independent evidence was used. But the conferral of such a grant of immunity will mean that the federal officers may not prosecute the witness for the subject matter of his testimony unless they can demonstrate that the evidence "is not tainted by establishing that they had an independent, legitimate source for the disputed evidence."[155] As one critic has contended, a complete lack of taint would be very difficult to prove:

> It would seem virtually impossible to discharge this burden of showing that testimony known to an investigator did not influence him in conducting a search for evidence upon which to base a prosecution. Any court faced with such facts will probably find, in most cases, that the prosecutor has failed to sustain that burden. Even in situations where a prosecutor was preparing or had commenced an investigation, it would be difficult to show that testimony about which he knew or should reasonably have known did not influence the direction taken by his investigation. And where no investigation had been undertaken before a witness testified, and investigation leading to prosecution was then com-

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Against Self-Incrimination and the Government's Need for Information, 1966 SUP. CT. REV. 103, 165. Apparently, if the compelled testimony were used as a basis for deciding to prosecute, any so-called "independent source" found as a result of the compelled testimony would not be "independent" under the majority's definition. 406 U.S. at 460.

152. 406 U.S. at 460.

153. *Id.* at 469.

154. 4 FRIEDMAN, THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969, THEIR LIVES AND MAJOR OPINIONS 289 (1969), *quoting from* Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 (1964).

155. 378 U.S. at 79 n.18.

> menced, the burden could not be realistically discharged. The resulting crippling limitation on the ability to prosecute could be more dangerous than a limitation on the ability to investigate.[156]

The failure of the Court, both in *Murphy* and *Kastigar*, to explicate the precise scope and nature of the government's burden has created this uncertainty. The generalities asserted in these decisions have left innumerable questions to be answered before the operative constitutionality of use and derivative use immunity can be established. For example, it is not at all clear whether absolutely all evidence linked to a tainted source must be excluded or whether evidence which has become attenuated from the source of the primary taint may be admitted. Nor is it known whether the government must demonstrate the independent character of its evidence beyond a reasonable doubt or by only a preponderance of the evidence.

The most definitive indication given by the *Kastigar* majority as to the scope and nature of the government's burden was its analogy to the exclusionary protection afforded in coerced confession cases.[157] The Court reasoned that since a coerced confession, which is as revealing of leads as testimony given in exchange for immunity, does not bar a subsequent prosecution, but is just inadmissible, then a fortiori a prosecution should not be barred simply because testimony was previously compelled under an immunity statute.[158] In fact, the Court argued, a witness compelled to testify by a grant of immunity is in a stronger position at trial than a defendant who gave a coerced confession since:

> One raising a claim under this [immunity] statute need only show that he testified under a grant of immunity in order to shift to the government the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate, independent sources. On the other hand, a defendant raising a coerced-confession claim under the Fifth Amendment must first prevail in a voluntariness hearing before his confession and evidence derived therefrom become inadmissible.[159]

The inference to be drawn is that the Court intended the exclusionary rule to be applied similarly in both coerced confession cases and immunity cases, both of which deal with the privilege against self-incrimination.

This interpretation is consistent with the legislative history of the

156. Note, *Self-Incrimination and the States: Restriking the Balance*, 73 YALE L.J. 1491, 1495 (1964).

157. 406 U.S. at 461.

158. *Id.* at 462.

159. *Id.* at 461-62.

immunity statute involved in *Kastigar*.[160] Congressman Poff, who introduced the bill in the House of Representatives, commented in subcommittee hearings:

> [T]he immunity grant would constitute a ground for the suppression of the use of compelled testimony and the fruits of that testimony, rather than a total defense. It would be a use restriction, a use restriction similar to the exclusionary rule which is now applied against such things as involuntary confessions, evidence acquired from unlawful searches and seizures, evidence acquired in violation of the *Miranda* warnings, to cite only a few examples. The witness could be prosecuted for his crime under this bill, provided the evidence used against him is independent of and untainted by the compelled testimony or its fruits.[161]

Presumably, Congress perceived the *Murphy* use restriction to be the equivalent of the exclusionary protection afforded in coerced confession and illegal search and seizure cases. Such an interpretation would not protect against all possible incriminating evidentiary uses of the witness' compelled testimony.

A leading case on the exclusion of evidence derived from coerced confessions is *Harrison v. United States*.[162] The *Harrison* Court held that neither a coerced confession nor any information derived therefrom is admissible into evidence, but applied the Fourth Amendment's exclusionary rule as developed in the case of *Wong Sun v. United States*[163] to determine if the evidence used by the prosecution was independent

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160. HOUSE REPORT ON ORGANIZED CRIME CONTROL ACT OF 1970, H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. (1970).

161. *Hearings on H.R. 11157 and H.R. 12041 before Subcomm. No. 3 of the House Comm. on the Judiciary*, 91st Cong., 1st Sess., ser. 14, at 30 (1969). Congressman Poff's suggestion that the same exclusionary rule should be applied in immunity cases as is applied in search and seizure cases and coerced confession cases is based on his conclusion that, since the courts must decide "precisely the same problem" in each of these situations, we should apply the already developed case law of search and seizure to this similar situation. *Id.* at 53. *But see* note 164 *infra*.

162. 392 U.S. 219 (1968). *Harrison* involved the issue of whether the use of defendant's statements, given in a prior trial wherein coerced confessions had been admitted into evidence, amounted to "the inadmissible fruit of the illegally procured confessions." *Id.* at 221.

163. 371 U.S. 471 (1963). It should be noted that, in the House committee report on the bill containing the immunity provisions involved in the *Kastigar* case, Wong Sun v. United States was cited as the present law regarding the protection to be afforded a witness from use of evidence derivatively obtained:

> It is designed to reflect the use-restriction immunity concept of *Murphy v. Waterfront Commission* rather (sic) the transaction immunity concept of *Counselman v. Hitchcock*. The witness is also protected against the use of evidence derivatively obtained. The statutory language is phrased in the terms of present law. See *Wong Sun v. United States*. (Citations omitted). HOUSE REPORT ON ORGANIZED CRIME CONTROL ACT OF 1970, H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. (1970).

of the defendant's compelled testimony.[164] The rule pronounced in *Wong Sun* was that evidence may be admissible even when it would not have been exposed but for the primarily illegality:

> We need not hold that all evidence is "fruit of the poisonous tree" *simply because it would not have come to light but for the illegal actions of the police.* Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."[165]

It is this part of the "fruit of the poisonous tree doctrine" which makes the exclusionary rule inadequate when applied to immunity cases. The

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164. This application of the Fourth Amendment's exclusionary rule to the Fifth Amendment's privilege against self-incrimination ignores the critical differences between the Fourth and Fifth Amendments and the different purposes served by the exclusion of evidence under these amendments.

The primary purpose of the exclusionary rule in Fourth Amendment cases is to insure the right of privacy by deterring improper police conduct through the removal of any incentive to disregard the requirements of the Fourth Amendment. Elkins v. United States, 364 U.S. 206, 217 (1960); Blackburn v. Alabama, 361 U.S. 199, 207 (1960). In the case of Tehan v. United States, 382 U.S. 406 (1966), the Court explained that the "single and distinct" purpose of the exclusionary rule in Fourth Amendment cases is to deter future police misconduct. *Id.* at 413.

In contrast, the primary import of the Fifth Amendment is to protect an individual from becoming a witness against himself. As the Court stated in Brown v. Walker, 161 U.S. 591, 605-06 (1896), "the constitutional privilege against self-incrimination is not to aid the witness in vindicating his character but to protect him against being compelled to furnish evidence to convict him of a criminal charge." The exclusion of evidence obtained in violation of the Fourth Amendment is an incomplete remedy which does not purge the unconstitutional nature of the police misconduct. On the other hand, the Fifth Amendment does not prohibit the government from invading an individual's privacy by compelling him to testify against his will. Rather, it prohibits incriminating uses of such testimony, while only incidentally circumscribing government conduct. The issue of deterrence is of little concern in Fifth Amendment cases and the efficacy of the amendment is judged by its success in preventing self-incrimination and not by its deterrent effect.

Notably, the Fourth Amendment does not expressly require the exclusion of evidence obtained by an illegal search and seizure. However, when the amendment's prohibition was endangered by continual violations, the Court, in Mapp v. Ohio, 367 U.S. 643 (1961), interpreted the amendment to require the exclusion of any evidence seized contrary to its terms. Thus, the exclusionary rule applied in Fourth Amendment cases is merely a method by which the constitutional prohibition is enforced and is not part of the amendment's inherent guarantee. *See id.* at 656. To be distinguished, however, is the exclusionary protection afforded by the Fifth Amendment's privilege against self-incrimination. It is the preclusion of incriminating uses that is the *essence* of the privilege; the exclusion is not just a method to implement some other constitutional right.

165. 371 U.S. at 487-88 (emphasis added).

Murphy burden demands that no testimony or information derived from it be used against the witness. It does not include the qualification "unless 'sufficiently distinguishable to be purged of the primary taint.'" Whether the *Kastigar* Court intended to incorporate this attenuation doctrine as a limitation on a use and derivative use immunity grant was left unanswered.

Similarly, the Court was silent as to whether its analogy was intended to delineate the nature of the burden of proof imposed on the prosecuting authorities. Prior to the *Murphy* decision, it was generally assumed that transactional immunity was constitutionally required and therefore this issue did not arise. Subsequent to *Murphy*, however, lower courts have had the opportunity to comment on the *Murphy* burden, generally concluding:

> [T]he burden would be on the Government to prove, *clearly and convincingly*, that all of its proof is derived from sources completely independent of the [witness'] grand jury testimony, and any clues or leads derived from such testimony.[166]

However, if Justice Powell's analogy to the exclusionary rule in coerced confession cases is construed by the lower courts to require the same magnitude of proof for determining whether there has been derivative use of immunized testimony as is used in pre-trial voluntariness hearings, the recent case of *Lego v. Twomey, Warden*[167] would define the nature of the burden of proof required for the government to demonstrate the independent nature of its evidence. The *Lego* Court held that a "preponderance of the evidence" standard should be applied to determine whether or not the defendant's confession was voluntarily given.[168] Applying this standard to immunity cases, the prosecutor would need only show by a preponderance of the evidence that there was no derivative use of the witness' immunized testimony. The *Lego* Court specifically rejected the petitioner's contention that a "reasonable doubt" standard is of vital importance to the protection of the values underlying the Fifth Amendment.[169] Justices Brennan, Douglas and Marshall, dissenting in *Lego*, argued that the preponderance standard did not provide sufficient protection against the use of involuntary confessions at trial, and that a "beyond a reasonable doubt" standard should be

166. United States v. Pappadio, 235 F. Supp. 887, 890 (S.D.N.Y. 1964) (emphasis added), *aff'd.*, 346 F.2d 5 (2d Cir. 1965); *see* United States v. Birrell, 269 F. Supp. 716, 725 (S.D.N.Y. 1967).

167. 404 U.S. 477 (1972).

168. *Id.* at 489.

169. *Id.* at 487-88.

applied.[170] Several lower federal courts are in accord with the imposition of this stricter reasonable doubt standard.[171]

The Court's exclusionary rule analogy suggests further disquieting possibilities in addition to those relating to the nature and scope of the government's burden to show an independent source. There is a noticeable trend on the part of the Court to strictly circumscribe the exclusionary protection afforded in coerced confession cases. The decision in *Harris v. New York*[172] is illustrative of this trend. In *Harris*, an otherwise voluntary confession was ruled inadmissible in the prosecution's case-in-chief because the defendant had not been informed of his right to counsel and his right to remain silent. The Court, however, held that the confession was admissible for the purpose of attacking the credibility of the defendant's trial testimony.[173] There is no language in *Kastigar* to preclude the extension of the *Harris* rule to allow the use of testimony acquired under a grant of immunity to impeach subsequent trial testimony.

Justice Marshall severely criticized the majority's reliance on the exclusionary rule analogy: "An immunity statute . . . is much more ambitious than any exclusionary rule."[174] Justice Marshall characterized the exclusionary protection provided in coerced confession cases as a necessarily limited judicial remedy provided to ameliorate the position of a witness who has been unconstitutionally compelled to incriminate himself: "If an unconstitutional interrogation or search were held to create transactional immunity, that might well be regarded as an excessively high price to pay for the 'constable's blunder.' "[175] The availability of such partial protection, however, is not intended to purge

170. *Id.* at 494. In their opinion, the preponderance standard does not provide sufficient protection against the danger of the use of involuntary confessions at trial. The standard of proof required for a showing of voluntariness should be the same standard required for criminal convictions. They concluded that the command of the Fifth Amendment is that it is worse to convict an innocent man or permit involuntary self-condemnation than it is to, respectively, let a guilty man go free or deprive a jury of probative evidence. *Id.* at 494-95.

171. Two federal courts have held, as an exercise of their *supervisory* powers, that voluntariness must be proved beyond a reasonable doubt: Ralph v. Warden, 438 F.2d 786, 793 (4th Cir. 1970); Pea v. United States, 397 F.2d 627 (D.C. Cir. 1968); *cf.* United States v. Schipani, 289 F. Supp. 43 (E.D.N.Y. 1968), *aff'd*, 412 F.2d 1262 (2d Cir. 1968) (court required the government to prove beyond a reasonable doubt that certain evidence was not derived from illegally seized evidence).

172. 401 U.S. 222 (1971).

173. *Id.* at 226.

174. 406 U.S. at 470.

175. *Id.* at 471.

or sanction the unconstitutional government action.[176] A grant of immunity, on the other hand, represents a reasoned and constitutionally approved decision to interrogate an otherwise privileged witness. While the exclusionary rule is intended to deter unconstitutional conduct, a grant of immunity encourages an interrogation which otherwise would violate the Fifth Amendment. Accordingly, Justice Marshall concluded that a more demanding standard than that indicated by the majority's analogy to the exclusionary rule was needed to supplant the privilege.[177]

There are other problems in addition to those raised by the exclusionary rule analogy. Although the immunity statute literally precludes the use of "any information" derived from the compelled testimony,[178] the *Kastigar* opinion, as did earlier decisions, defined the exclusionary protection afforded by this statute as prohibiting only the use of *evidence* derived from the compelled testimony.[179] However, as one commentator has noted,[180] evidentiary uses are not the only advantages gained from compelling a witness to testify by granting him immunity. One example of the non-evidentiary or strategic advantages gained by compelling a witness' testimony is the opportunity it affords to obtain complete pretrial discovery of the defense case and defense strategy. An extensive grand jury interrogation would bring out the strengths and weaknesses of the witness' case, information which undoubtedly would be useful in a subsequent prosecution. Moreover, the prosecution's trial strategy could be affected by information disclosed in the compelled testimony. For example, such information could aid in deciding whether to impeach the witness if he should testify at a subsequent trial, in structuring the prosecutor's opening statement and order of presentation of evidence and witnesses, and in providing a basis for objection to particular questions asked of witnesses by defense counsel.

176. Directing attention to the purpose of the exclusionary rule in Fourth Amendment and Fifth Amendment coerced confession cases, Justice Marshall noted:

> The constitutional violation remains, and may provide the basis for other relief, such as a civil action for damages (see 42 U.S.C. § 1983 and *Bivens v. Six Agents*, 403 U.S. 388 (1971)), or a criminal prosecution of the responsible officers (see 18 U.S.C. §§ 241-242). The Constitution does not authorize police officers to coerce confessions or to invade privacy without cause, so long as no use is made of the evidence they obtain. But this Court has held that the Constitution does authorize the government to compel a witness to give potentially incriminating testimony, so long as no incriminating use is made of the resulting evidence. *Id.* at 470-71.

177. *Id.*

178. 18 U.S.C. § 6002 (1970); *see* note 10 *supra.*

179. 406 U.S. at 459-61.

180. Reif, *The Grand Jury Witness and Compulsory Testimony Legislation*, 10 AM. CRIM. L. REV. 829, 857-58 (1972).

Significantly, the defense would have no corresponding right to such broad discovery.[181]

If such strategic advantages are not taken away from the prosecution, then the witness is not put in the same position as he would have been in had he not been compelled to testify. However, even assuming such non-evidentiary uses are encompassed within the *Kastigar* Court's interpretation of prohibited uses, the Court failed to delineate a procedure which would adequately ferret out such subtle uses.[182] Perhaps such

181. See note 132 *supra.*

182. The *Kastigar* Court made very few comments concerning the enforcement of the prohibition: (1) it must ensure that absolutely no use is made of the compelled testimony against the witness; (2) use of the testimony as an investigatory lead or acquisition of evidence as a result of focusing an investigation on a particular witness is forbidden; (3) any evidence introduced against the witness at a subsequent trial must be derived from an independent source; and (4) the prosecuting authorities have the affirmative burden of showing an independent source. 406 U.S. at 460. These are the only clues which are given as to how the prohibition will be enforced. One can only speculate from them as to the prohibition's precise application. Certain procedural safeguards should be adopted when use and derivative use immunity is granted in order to ensure that absolutely no use is made of the compelled testimony against the witness.

First, the prosecution should have to establish the independence of its evidence beyond a reasonable doubt. This is the highest burden of proof which can be imposed short of excluding all evidence. It strikes a balance between the witness' Fifth Amendment privilege against self-incrimination and the legitimate interests of law enforcement in obtaining information from the witness. This is a familiar standard in criminal cases and one which some jurisdictions have already adopted in applying the fruit of the poisonous tree doctrine. Pea v. United States, 397 F.2d 627 (D.C. Cir. 1968); United States v. Schipani, 289 F. Supp. 43 (S.D.N.Y. 1968). A less demanding standard would increase the danger of a secret or undetected use of the compelled testimony.

Second, different statutory presumptions of taint should be established according to the date on which the challenged evidence is received. A system should be developed whereby the prosecution can certify the information which it has at the time of the granting of immunity. This certified evidence should have the presumption of being prima facie untainted. Any evidence obtained after the witness testifies or that was not certified should have a rebuttable presumption of taint. Such an approach is implicitly suggested by 18 U.S.C. § 6004(b)(3) (1970). This section provides that no immunity may be granted prior to giving 10 days notice to the Attorney General of the United States. The function of this section is to provide the Attorney General with sufficient time to gather the information and evidence necessary for a successful prosecution of the witness *before* the immunized testimony is actually given. *See* NATIONAL COMM'N ON REFORM OF FED. CRIMINAL LAWS, WORKING PAPERS 1406 (1970).

Third, the prosecutor should be obliged to swear that he has not used the compelled testimony or any information derived from it. At the hearing on the motion to suppress the evidence, the prosecutor and other investigative personnel should be questioned by the court and by defense counsel to determine the source of the evidence. This would hopefully reduce the risk of inadvertent use by encouraging the prosecutor's office to adopt internal checks and procedures to protect against such unknowing uses.

disquieting considerations prompted the Court to conclude that, in order for a grant of immunity to be coexstensive with the Fifth Amendment privilege, it need only leave "the witness and the prosecutorial authorities in *substantially* the same position as if the witness had claimed the Fifth Amendment privilege."[183]

Ostensibly, the statute upheld in *Kastigar* was intended to assist the government in combating criminal activity. If, however, Justice Marshall's prediction is correct and lower courts will allow the government to meet its burden by mere assertion that its evidence is independently derived,[184] it will be difficult to convince any potential witness that by testifying he will not be taking a substantial risk of incriminating himself. Under such circumstances, the impact of the *Kastigar* decision could severely hinder the government in its efforts to obtain evidence and information necessary to successfully prosecute certain types of criminal activity (*e.g.*, organized crime).[185] For, if it appears in practice that supposedly immunized testimony can be used to adversely affect a witness, then the alternative of refusing to testify and being jailed for contempt may prove to be more acceptable. At the very least, a witness who is compelled to testify will be less likely to fully disclose any information which he might possess.

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The court could also call other witnesses to corroborate the testimony given. *See also* notes 132, 137-38 *supra.*

183. 406 U.S. at 462 (emphasis added).

184. *Id.* at 469.

185. Interestingly, the representative of the Attorney General of the United States in testifying before a subcommittee for the House Committee on the Judiciary stated:

> As a practical matter, where the witness has elected to testify under this statute, and he has been used, it would be a *most unusual* circumstance for the Government that used him to turn around and prosecute him. You have coupled with that—irrespective of the statute—the agreement not to prosecute. *Hearings on H.R. 11157 and H.R. 12041 Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 91st Cong., 1st Sess., ser. 14, at 47 (1970).

See notes 134-38 *supra* and accompanying text.